92-2049

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

FLOJO TRADING CORPORATION,

Petitioner,

v.

JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To the Court of Appeals
For the Fifth Judicial District of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI OF FLOJO TRADING CORPORATION

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June 23, 1993

QUESTIONS PRESENTED

1. Should the Texas courts be allowed to uphold a $70,000,000.00 Texas judgment against an unnamed and unserved defendant, squarely in the face of this Court's 1988 decision in *Peralta v. Heights Medical Center, Inc.*, holding that the Due Process Clause of the 14th Amendment requires that an unappealed Texas judgment against an unserved defendant must be vacated in a Texas bill of review such as the present case?

2. Does the Due Process Clause of the 14th Amendment void a state court judgment when the uncontroverted summary judgment record establishes not only that the judge had a direct personal interest of more than $100,000.00 in the case, but also that he "functioned as a team" with the Respondents' attorneys, and that his judgment was the product of what the Fifth Circuit has characterized as a "corrupt abuse of the judicial process" and a "fraud on the court?"

PARTIES TO THE PROCEEDING

Pat S. Holloway
Robbie Holloway
Flojo Trading Corporation
Humble Exploration Company, Inc.(now HECI Exploration Co.)
Sterling Pipeline Company
Jane H. Browning, individually and as co-executrix and co-trustee of the estate of William W. Browning, Jr., deceased
Michael G. Starnes, individually and as co-executor and co-trustee of the estate of William W. Browning Jr., deceased, and as co-trustee of the Browning Childrens' Trust
William W. Browning, III
Kathryn Browning
Averille Browning
Fallon Browning
Robert Browning

Flojo Trading Corporation has no parent or subsidiary corporation, and is not affiliated with any other corporation.

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PETITION FOR WRIT OF CERTIORARI OF FLOJO TRADING CORPORATION

Petitioner, Flojo Trading Corporation respectfully prays for a writ of certiorari to the Court of Appeals for the Fifth Judicial District of Texas at Dallas.

OPINION BELOW

The opinion of the Dallas Court of Appeals is reported in 840 S.W.2d 14 and is reprinted at p.1 in the separately bound Appendix filed by Petitioners, Pat S. Holloway and Robbie Holloway in this case, which this Petitioner adopts as its own Appendix.

JURISDICTION

Petitioner's timely application for writ of error filed in the Supreme Court of Texas was denied on February 10, 1993, and its timely motion for rehearing was overruled on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(3).

CONSTITUTIONAL PROVISION

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This case is a combined equitable bill of review and collateral attack brought by Petitioners, Pat S. Holloway ("Holloway") and his former wife Robbie Holloway ("Robbie"), in which Flojo was made an involuntary Plaintiff, to set aside a judgment by former Dallas District Judge Dee Brown Walker (the "Walker Judgment") in the prior case of *Jane H. Browning et al v. Pat S. Holloway et al.* (the "Browning Case").

In the Browning Case the Respondents here, the Brownings, had sued the Holloways and Holloway's companies, Humble Exploration Company, Inc.("Humble") and Sterling Pipeline Company ("Sterling") for damages and constructive trust based on fraud and breach of fiduciary duty.

Flojo Trading Corporation ("Flojo") invested in very small undivided interests in a number of Humble-operated wells on exactly the same proportionate basis as much larger participants in Humble's drilling programs such as Texaco, Inc., Columbia Gas Development Corporation, Santa Fe Minerals and others.

It is undisputed, and uncontroverted in the summary judgment record of this case, that at the time of the

Walker Judgment all of the outstanding stock of Flojo was both legally and beneficially owned by Bennie Jaehne, Herman Jaehne, Charles Adams, Joe Holt and Dean Johnson, key field and office employees of Humble. Holloway himself had never been a stockholder, employee or officer of Flojo and had never received any dividend, salary, or other payment, directly or indirectly, from Flojo. (Tr.IX:2153,2159).

It is likewise undisputed that neither Flojo nor any of its stockholders were either named as defendants or served with process in the Browning Case, and that neither Flojo nor any of its stockholders appeared before Judge Walker or waived service of process.

Nevertheless, the Walker Judgment entered in the Browning Case: (1) awarded Seventy Million Dollars ($70,000,000.00) as damages against Flojo, jointly and severally with the actual named and served defendants in the case; (2) imposed a constructive trust in favor of the Brownings on all the assets of Flojo; and (3) imposed another constructive trust in favor of the Brownings on all of the outstanding stock of Flojo owned by the five key employees of Humble, none of whom had been either named as defendants or served with process in the Browning Case.

Flojo timely and properly appealed from the Walker Judgment. But its appeal was dismissed by the Dallas Court of Appeals, along with those of the Holloways. The Dallas Court of Appeals assigned no reason whatever for the dismissal of Flojo's appeal, just as it assigned no reason for the dismissal of Robbie's properly filed separate appeal. *Humble Exploration Company, Inc. v. Browning*, 677 S.W.2d 111 (Tex.-App.--Dallas 1984) *dism'l reinstated* 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.)(en banc), *cert. denied* 674 U.S. 1065 (1986).[1]

Flojo refused to join as a plaintiff in the present case, having had more than its fill of "Dallas Justice" in the Browning Case. Flojo preferred to pursue instead a collateral attack by its stockholders on the Walker Judgment in the Lee County case of *Jaehne v. Starnes* here in Giddings where a majority of its stockholders reside, and near where all its properties are located.

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1 Holloway's appeal was dismissed on the ground that he had "elected a federal remedy" when the trustee for his estate in bankruptcy had filed a defensive pleading in *Browning v. Navarro*, the federal action brought by the Brownings to enforce the Walker Judgment during the state court appeal thereof. But Flojo has never been a defendant, much less a plaintiff, in any federal action, and so could not possibly have "elected a federal remedy" to justify the dismissal of its state appeal. Because Flojo was never a party in any federal case, there is no contention that Flojo's claims in the present case are barred by federal res judicata.

In Holloway's petition in the present case, he named Flojo as an involuntary plaintiff under Tex. R. Civ. P. 39(a), providing that when a proper or necessary party refuses to join as a plaintiff, "he may be made a defendant, or, in a proper case, an involuntary plaintiff."

But Flojo was never actually served with any process in the present case either. Nor did it appear voluntarily or waive service of process. But the district court in the present case rendered summary judgment against Flojo in its absence, just as in the Browning Case, ruling that the Walker Judgment was valid as to Flojo notwithstanding its entire absence from that case also.

Flojo also timely and properly appealed to the Dallas Court of Appeals in the present case, asserting the voidness of the Walker Judgment as to it under the Due Process Clause of the Fourteenth Amendment, both because of lack of service and because of the disqualification of Judge Walker by reason of his financial interest and bias.

Flojo pointed out both to the Dallas Court of Appeals and the Supreme Court of Texas, the undenied lack of service on it and the following uncontroverted facts in the Holloways' summary judgment record establishing Judge Walker's unconstitutional interest and bias:

1. **JUDGE WALKER RIGGED THE JURY ISSUES FOR THE BROWNINGS.**

After working *ex parte* with the Brownings' lawyers on their jury issues, Judge Walker allowed them 95 numbered special issues amounting, with all their subparts, to 444 separate questions for the jury, all exactly as requested by the Brownings (1982 Tr. IX:1269-1315), along with 10 pages of instructions, also exactly as requested by the Brownings. (1982 Tr.IX:1259-68). He peremptorily denied each and every objection to the Brownings' issues made by the defendants. (1982 S.F. 3884-4120). The defendants requested 80 special issues and instructions of their own. (1982 Tr.XIV:2025-2109). Judge Walker peremptorily denied all 80 of the special issues and instructions requested by the defendants. Id.

Then he relented to allow the defendants one special issue, whatever they chose. They chose an issue on limitation (No. 87). The jury answered this issue in favor of the defendants. The jury found that all of the Brownings' claims to own Humble and for fraud by Holloway in connection therewith were barred in 1979 by both the 4-year and the 2-year statutes of limitation. (1982 Tr.IX:1315). Judge Walker then set aside this controlling jury finding, entered judgment n o v. for the Brownings on their claim to own Humble, and adjudged Holloway guilty of fraud. (1982 Tr.X:1421).

2. THE JURY THREE TIMES FOUND HUMBLE BELONGED TO HOLLOWAY; JUDGE WALKER AWARDED IT TO THE BROWNINGS.

The Brownings submitted three special issues to the jury on their claim to own Humble (Nos. 1,8 and 61). The jury answered all three issues in favor of the defendant Holloway. (1982 Tr.IX:1269, 1273 and 1294). Judge Walker disregarded all three jury findings and awarded Humble, worth more than Two Hundred Million Dollars ($200,000,000.00), to the Brownings.

3. THE JURY FOUND FOR HOLLOWAY 22 TIMES ON STERLING PIPELINE COMPANY; JUDGE WALKER AWARDED IT TO THE BROWNINGS.

The Brownings submitted **22** special issues to the jury with respect to their claims to Holloway's other company, Sterling Pipeline Company. The jury answered **all 22** of these Browning issues in favor of the defendant Holloway.[2] Judge Walker disregarded **all 22** of these jury findings and awarded Sterling, worth more than Fifty Million Dollars ($50,000,000.00), to the Brownings. (1982 Tr. X:1421).

4. JUDGE WALKER AWARDED $72,000,000.00 DAMAGES AGAINST HOLLOWAY, ET AL. FOR FICTITIOUS REDUCTION IN VALUE OF HOLLOWAY'S OWN COMPANIES.

Judge Walker also awarded $72,000,000.00 damages to the Brownings against Holloway and his companies.

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2 Nos. 15, 18, 23, 29, 32, 36, 36-A, 39, 39-A, 42, 45, 48, 51, 54, 58, 61, 65, 68, 76, 85 and 86; 1982 Tr. IX: 1276-1346.

This was derived from jury findings based solely on the testimony of one expert witness, which the defendants were not allowed to rebut, as to a totally fictitious $500,000,000.00 decrease in the value of Humble and Sterling between the 1979 date of suit and the 1982 trial date.[3] The jury repeatedly found these companies belonged to Holloway, not the Brownings. Holloway, Humble and Sterling were thus held liable for fictitious damages to themselves, while by the same judgment all their assets were transferred to Respondent, Starnes via constructive trust.

The jury twice found that the Holloway-Humble-Sterling defendants had caused "zero" damages to the plaintiff Browning Estate. (Issues Nos. 83 and 85, 1982 Tr.IV:1313-4.) There was no evidence that any of the stock or assets of Flojo had been paid for to any extent by the Brownings; yet constructive trusts were imposed for the Brownings on all of such stock and assets.

5. THE JURY FOUND PLAINTIFF STARNES EQUALLY AT FAULT AS DEFENDANT HOLLOWAY; YET JUDGE WALKER TRANSFERRED EVERYTHING HOLLOWAY OWNED TO STARNES.

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3 According to evaluations by the oil loan department of Republic National Bank of Dallas, Humble's bank, Humble actually increased in value from less than $15,000,000.00 in June, 1979, to more than $150,000,000.00 in 1982.

The jury also found that Holloway was no more at fault in administering the $30,000 Browning Childrens' Trust than his co-trustee, plaintiff Michael G. Starnes. (Issue No. 82, Tr.IX:1308). Yet Judge Walker by his judgment *n.o.v.* transferred all of the Holloways' properties and assets, including their Dallas residence, their Giddings home and farm, and Holloway's inherited family property, to co-trustee Starnes; and he denied all of Holloway's claims for contribution or indemnity from equally-at-fault co-trustee Starnes.

6. JUDGE WALKER'S JUDGMENT N.O.V. GAVE THE BROWNINGS MUCH MORE THAN THEY EVEN SUED FOR.

Judge Walker did much more than just disregard all jury issues favorable to the defendants. He gave the Brownings not just everything they asked for in their pleading; he gave them much more than they asked for and much, much more than they even attempted to show by any evidence. Thus he imposed, on the alleged basis of a "trust opportunity" (a doctrine which does not exist in Texas trust law) of the $30,000 Browning Childrens' Trust, constructive trusts for the Brownings on: (1) real property which had been owned by co-trustee Holloway's family for more than 60 years (1982 Tr.XX:2969); (2) the Holloways' residence in Dallas (1982 Tr.XX:2960); (3) their farm and home near Giddings (1982 Tr.XX:2960); (4) several thousand oil and gas leases and several hundred producing oil and gas wells, not described in the Brownings' petition, and concerning which no evidence had been introduced at

trial; (5) all the assets of non-party Flojo; and (6) all the stock of its non-party stockholders.

The Brownings principal witness Starnes had admitted on the witness stand that **none** of these "constructive trust" properties had actually been paid for to any extent by any Browning money. (1982 S.F. 1955-6).

7. LATER, JUDGE WALKER GAVE THE BROWNINGS EVEN MORE.

Then Judge Walker amended his original final judgment *n.o.v.* 2-1/2 months after he entered it in order to divest the defendants of an additional 125 undeveloped leases (Tr.XX:2191-9) and 55 more wells (Tr.XX:2190). These had been overlooked by the Brownings' receiver in his preparation of the judgment exhibits (which had commenced in the Humble office early during the trial). None of these additional properties were described in the Brownings' trial petition, no evidence had been introduced concerning them at trial, and there was no post-trial evidence or hearing to support the amended judgment.

8. JUDGE WALKER AND THE BROWNINGS ATTORNEYS "FUNCTIONED AS A TEAM" IN THE BROWNING CASE.

After *ex parte* meetings with Respondent, Starnes and Respondents' attorney, Kelsoe, Judge Walker appointed Mr. James Lovett, a C.P.A. and former partner of Coopers & Lybrand, as Chief Executive Officer of Humble during

the Brownings' illegal receiverships in which the trial was conducted. Mr. Lovett's uncontroverted summary judgment affidavit in the present record includes the following:

> "9. During the period of my employment by the Receiver, I met with Judge Walker in his chambers on approximately six occasions . . .Kelsoe and Ayres were present for at least four of the meetings. Michael G. Starnes attended some of them . . . at the meetings Kelsoe, the others and Judge Walker often talked freely and openly about the lawsuit . . .To my knowledge, neither Humble nor Holloway nor anyone connected with them was invited to attend the meetings.
>
> 10. At the meetings in Judge Walker's chambers, Walker, Sessions, Kelsoe and the others clearly functioned as a team to deal with the receivership and the above litigation . . . At more than one of the meetings, Kelsoe and Ayres gave Judge Walker orders affecting the aforesaid litigation and Judge Walker signed the orders without notifying any other parties. At the meetings, Kelsoe, Ayres, Sessions, Starnes and Judge Walker freely discussed the litigation.
>
> * * *
>
> 16. During the meetings with Judge Walker, Kelsoe, Ayres, Sessions and Hurt made many suggestions affecting both the receivership and the litigation that

was pending before the Judge. None of the suggestions was ever denied."

(Tr. II:442-5).

9. **"LIKEWISE, AT THE CONCLUSION OF COURT EACH DAY, A MEETING BETWEEN JUDGE WALKER AND [RESPONDENTS' ATTORNEYS] IN JUDGE WALKER'S OFFICE WOULD COMMENCE."**

The entirely uncontroverted summary judgment affidavit of Humble's unprepared trial counsel includes the following:

"6. Additionally throughout the...Browning litigation, there were long recesses in both morning and afternoon during which time Messr. Kelsoe and/or Ayres were in Judge Walker's chambers without attendance of Humble-Holloway attorneys... Likewise, at the conclusion of court each day, a meeting between Judge Walker and Messrs. Kelsoe and/or Ayres in Judge Walker's office would commence."

"7. During this multi-week procedure from late May until August 18,1982 Messrs. Kelsoe and/or Ayres regularly reposed in Judge Walker's chambers with the doors sometimes opened and the doors sometimes closed....* * * The Humble-Holloway interests were constantly confronted with a series of orders adverse to them, which orders could only

> have been generated through the joint efforts of Judge Walker, Mr. Kelsoe and/or Mr. Ayres. * * * From my first appearance before Judge Walker on the 26th day of May throughout the litigation, I was impressed that Judge Walker had grasped and embraced the position of the Brownings and was determined to exert his every effort to favor and advance the Browning interests as articulated and urged by Messrs. Kelsoe and Ayres."

(Tr.II:492-484)

10. JUDGE WALKER, WORKING PRIVATELY WITH THE BROWNINGS' ATTORNEYS ON THEIR JURY ISSUES, STATED THAT "WE ARE NOT GOING TO GIVE HOLLOWAY ANY JURY ISSUES" BECAUSE "UNDER OUR THEORY OF THE CASE HE IS NOT ENTITLED TO ANY."

Judge Walker worked privately with the Brownings' attorneys to prepare their jury issues, with no lawyer for the defendants present. (Tr.II:494 ¶3). At one of these attorneys' private work sessions (on a Saturday), Judge Walker stated that "**we** are not going to give Holloway any special issues", that "under **our** theory of the case he is not entitled to any" and so "**we** are not going to give him any." (Uncontroverted Affidavit of Judge Robert Hughes dated November 25, 1985, Tr. II:447-8; see also id. at 494 ¶7).

11. AYRES "OFTEN BRAGGED THAT THEY 'OWNED' JUDGE WALKER AND WERE 'WIRED' INTO [HIS] COURT . . . WALKER WAS INDEED THE SILENT PARTNER IN THE FIRM OF KELSOE & AYRES."

The summary judgment record includes the affidavit of Mr. Andrew L. Smith III, formerly a client of the Brownings' attorneys, Kelsoe and Ayres, and President of Smith Protective Services, Inc., the oldest and largest private security firm in Texas. As with the other affidavits, Mr. Smith's affidavit has been filed in the federal cases of *Holloway v. Walker* and *Browning v. Navarro* as well as in the present case; and neither Mr. Ayres, nor Mr. Kelsoe, nor Judge Walker, has ever denied or controverted any fact stated therein, even after being invited expressly by the Fifth Circuit to do so "if appropriate." *See Browning v. Navarro II*, 887 F.2d at 346.

Mr. Smith states as follows:

> In about 1976 at the offices of Kelsoe and Ayres on LBJ Freeway in Dallas, Ayres informed me of the relationship between Judge Dee Brown Walker and his new law partner Kelsoe. He explained that Judge Walker and Kelsoe were friends and that Kelsoe was Judge Walker's political campaign manager and personal attorney. In explicit terms Ayres stated that because of the arrangement with Judge Walker they were guaranteed to always win in his court. Furthermore, very important cases could be filed so that they were assigned to Judge Walker's Court.

The way Ayres explained it to me there was absolutely nothing left to chance. Even if the people they sued asked for a jury they would win either with a directed verdict or judgment N.O.V.

As the years passed Ayres who was never a modest man began to speak in bolder terms. He often bragged that they "owned" Judge Walker. He said that they were "wired" into the 162nd District Court where Judge Walker presided. On several occasions when I was in Ayres' office Judge Walker called him and Ayres actually instructed Judge Walker as to how to rule in cases that were then pending before Judge Walker. I came to believe based on what I saw and heard transpire between Ayres and Judge Walker that Walker was indeed the silent partner in the firm of Kelsoe and Ayres.

In about 1980 the investigative revenues of the Dallas Branch of Smith Protective Service, Inc. surged. When I inquired I learned that we were investigating a rich oil man named Pat Holloway for Ayres. What was most unusual was the way we were being paid, in cash. On one occasion Ayres called me at my Houston office in the spring of 1982 and told me that Mr. Holloway was in M. D. Anderson Hospital in Houston with cancer. He wanted me to penetrate the hospital's security and get all the information I could concerning Mr. Holloway's cancer condition. Although I could not get any information out of M. D. Anderson, I learned from

Ayres they had all the plans set to bring Holloway before Judge Walker where he would be "gutted".

(Tr.II:461-3)

12. JUDGE WALKER REPRESENTED THE BROWNINGS BEFORE OTHER COURTS IN THE BROWNING CASE.

Judge Walker, by his own admission, went before other judges *ex parte*, argued for, and obtained three separate court orders in order to retain jurisdiction over the Browning Case as the Brownings desired, despite the contrary ruling of the Acting Presiding Judge rendered after a contested hearing. (Tr. I:61-9; Tr.II:292-301, 378-87, 391; Tr. III: 672). But Judge Walker did not notify the defendants' attorneys so they could be present before the other judges. (Tr. II:292-4,297-9). Judge Walker obtained one of these *ex parte* orders on a Saturday evening, at the home of the ill presiding judge, with no notice to the defendants. (Tr. II:297-9).

13. JUDGE WALKER REPEATEDLY MET PRIVATELY WITH THE BROWNINGS' ATTORNEYS ABOUT HOW TO AVOID THE RULINGS OF THE DALLAS COURT OF APPEALS.

Judge Walker admitted that he had a number of private meetings ("I don't know how many we had") with the Brownings' attorneys about how to avoid the first ruling of the Dallas Court of Appeals vacating his Humble

receivership orders. As a result of these private conferences, in which the Brownings' attorneys instructed him they wished him to continue the receivership orders, Judge Walker defied the ruling of the appellate court. (Tr. I:74, 79, 82, 84 and 85).

Then, after the Dallas Court of Appeals issued its subsequent opinion, dated August 30, 1982, ordering the issuance of a writ of prohibition against Judge Walker to vacate the Humble receiverships previously held unlawful, Judge Walker met again privately with the Brownings and their attorneys to discuss how to avoid the writ of prohibition. This *ex parte* meeting was recorded by the court reporter. (Tr. II:500-Tr.III: 521).

At this meeting of the conspirators, Judge Walker said: "**We** have control of Humble through all of the hundred percent of the stock." (Tr. III:514). He said "**we** are in control and **we** are going to stay in control." (Tr.III:516-7). He said:

> "I have the original Humble stockholders' book in yonder locked up. I got it from the court reporters so I'll show you where it is in my office. I think **we'd** better have that."

(Tr.III:514). Referring to a case cited by the Dallas Court of Appeals, he said; "Had **we** all missed that one?" (Tr.III:519). Mr. Ayres answered: "Yes, **we** had." (Tr.III:519). At this meeting, Judge Walker approved the instructions to his private army of heavily-armed guards,

given by his receiver's attorney Sessions, to fire their shotguns at Humble's General Counsel C. Taylor Ashworth (a small, slightly-built former law clerk to Mr. Justice Brennan of this Court) if he put both his feet on the steps leading up to the Humble offices in reliance upon the order of the appellate court. (Tr.II:508-9). Sessions promised Judge Walker that "somebody is going to get shot if they do that." (Tr.II:508-9).[4]

14. JUDGE WALKER PERSONALLY WROTE A BRIEF TO THE DALLAS COURT OF APPEALS SUPPORTING THE BROWNINGS' POSITION.

After the Dallas Court of Appeals actually served on Judge Walker its **writ** of prohibition dated September 10, 1982 because he had defied its prohibition **opinion**, he responded with a letter brief to that court denying its jurisdiction and expressly preserving any "personal rights" in the Browning Case. (Tr.I:40). Here Judge Walker argues the erroneous and unsuccessful legal position of the Browning-Fairway plaintiffs in the consolidated Browning-Fairway case. He further asserts: "I do not concede jurisdiction nor do I waive any personal rights" (Tr.I:40).

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[4] Still later, when the Dallas Court of Appeals actually issued and served on Judge Walker its writ of prohibition after he had refused to comply with its prohibition opinion, he still refused to comply with such actually served writ, as he admitted. (Walker Dep. pp.390-91).

Flojo submits that the impact of these unbelievable events was greatly magnified as to Flojo, who was not named or served as a defendant, much less given an opportunity to prepare a defense to this onslaught of unconstitutional behavior.

In the present case, the Dallas Court of Appeals affirmed the judgment of the district court upholding the validity of the Walker Judgment against Flojo. Acknowledging the ruling of this Court in *Peralta*, *infra*, the court of appeals nevertheless affirmed the judgment against Flojo based on its failure to file proper pleadings in the district court in the present case in which it also was never served with process, and its failure to file in the district court its certificate of good standing from the Secretary of State of the State of Texas. *See* 840 S.W.2d at 22-5.

Flojo timely pointed out to the Texas Supreme Court the fact that it was never served with process in the present case, and had not appeared, or waived service of process, in the district court, so that the present judgment, as well as the Walker Judgment, was void as to it under federal due process and this Court's decision in *Peralta v. Heights Medical Center, Inc.*

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURTS SHOULD BE REQUIRED TO HONOR THIS COURT'S 1988 DECISION IN *PERALTA V. HEIGHTS MEDICAL CENTER, INC.* AND THE 160 YEARS OF PRECEDENTS IT UPHOLDS.

In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), the Court held that an unappealed Texas judgment rendered against a defendant not served with process, being void under both federal and Texas due process requirements, must be set aside in a Texas bill of review without any proof of other state law requirements of a Texas bill of review.

That is the present case. Flojo respectfully submits that it is important for this Court not to allow the Texas courts to continue, in the face of this Court's recent, unanimous decision in *Peralta*, to deprive persons of their "property in a manner contrary to the most basic tenets of due process." *Peralta*, *supra* at 86.

As stated in *Peralta*, *supra* at 84, notice to the defendant is an "elementary and fundamental requirement of due process", *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "[f]ailure to give notice violates 'the most rudimentary demands of due process of law'. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)."

Peralta also cites *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). There this Court ruled that a judgment entered against a defendant without service is "contrary to the first principles of justice", violates the Due Process Clause of the Fourteenth Amendment, and is "*coram non judice* and void." In *Pennoyer*, this Court also pointed out that it had, long before adoption of the 14th Amendment, held state court judgments rendered without service "absolutely void" under "immutable principles of natural justice." *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466,475 (1830); *Weldon v. Craig's Heirs*, 39 U.S. (14 Pet.) 147, 154 (1840); *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850).

If this Court allows the Texas courts, in the face of *Peralta*, to continue to disregard the "first principles of justice" and "the most basic tenets of due process", Flojo does not see how Texas litigants can reasonably expect the Texas courts to adhere to any of this Court's pronouncements on less fundamental, or more sophisticated, constitutional or federal issues.

The Brownings argued below, and the Dallas Court of Appeals accepted, that *Peralta* can be distinguished because in the Browning Case the jury found that Flojo was the alter ego of Holloway. And so it did, based solely on "expert" testimony as to the Texas law of alter ego by Judge Walker's personal accountant J. R. Hurt, whom Judge Walker had advised the jury was his own expert witness against the defendants. The defendants were not allowed to rebut or contradict this expert "legal" testimony by Judge Walker's own witness. It is uncontroverted in the

summary judgment record of the present case that Holloway himself had never been a stockholder, employee or officer of Flojo and had never received any dividend, salary, or other payment, directly or indirectly, from Flojo. (Tr:IX:2153-2159)

But irrespective of all that, the fundamental constitutional defect remains that neither Flojo itself nor any of its actual stockholders were ever named as parties or served with process, and so had no notice or opportunity to defend themselves against the alter ego claim. As the Supreme Court of Texas itself recently has held in another case, the fact that a trial court has made a finding that an unnamed and unserved corporation is an alter ego of an actual defendant is not ground for entry of judgment against the unnamed and unserved corporation. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991).

The Dallas Court of Appeals also upheld the Walker Judgment against Flojo's due process claim because of its failure to file proper pleadings in the district court in the present case, including its certificate of good standing showing it had paid its delinquent franchise taxes. 840 S.W.2d at 23, 24 and 25.

The Brownings appeared to abandon this ground for sustaining the Walker Judgment against Flojo in the Texas Supreme Court, after Flojo asserted there that it had never been served with process in the present case either, an assertion the Brownings in their response did not deny. Flojo pointed out that the record in the present case

shows no service on Flojo, and no appearance or waiver of service filed by it in the present case.

As the Supreme Court of Texas recently has ruled again, lack of jurisdiction because of lack of service is an issue which under Texas procedure can be raised for the first time in the Texas Supreme Court. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (1991).

If the Brownings argue to this Court that the decision below, upholding the Walker Judgment against unserved Flojo, is based on an "adequate" state law ground, the short answer to this is that

> "while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. * * * a State may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682 (1929).[5]

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5 "State procedural grounds for disregarding federal claims cannot be found adequate if they fall below the requirements of due process." 16 Wright, Miller, Cooper & Crensham, *Federal Practice and Procedure*, §4025, p. 725 (1977). *See Peralta, supra* at 83 and 85.

The net result as to Flojo is that the district court in the present case has entered a judgment which is void for lack of due process, upholding the validity of another judgment which is void for lack of due process, to wit, the Walker Judgment in which Flojo was not even named as a defendant, much less served with any process.

Even if the demands upon the time of this Court are such that it cannot vacate every Texas judgment presented to it which has been rendered without notice or service in violation of "the most basic tenets of due process", Flojo can only hope that because it offers up in this single petition two void $70,000,000.00 Texas judgments against it rendered a decade apart, considerations of judicial economy may induce this Court to grant this petition and summarily reverse the courts below.

II. THE WALKER JUDGMENT IS VOID UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT BECAUSE OF THE FINANCIAL INTEREST AND PATENT BIAS OF JUDGE WALKER.

It is clear that Flojo was entitled under Texas law to raise the constitutional issue of Judge Walker's disqualification in the present case. The issue of constitutional disqualification may be raised, even by a served defendant,

for the first time on appeal. *Buckholtz Ind. School Dist. v. Glazer*, 632 S.W.2d 146, 148 (Tex. 1982)[6]

A. JUDGE WALKER'S FINANCIAL INTEREST OF MORE THAN $100,000 IN THE BROWNING CASE DISQUALIFIED HIM UNDER THE DUE PROCESS CLAUSE.

As detailed in the Holloways' separate petition in this case, Judge Walker, by *ex parte* orders entered in the illegal Browning-Fairway receiverships, took more than $100,000 out of the defendant Humble and paid it to (1) his personal lawyers and accountant who were then working for him personally without any further compensation in other, unrelated matters, and (2) his personal attorney whom he had privately hired to represent him personally in the Browning Case. Unless Judge Walker divested Holloway of his ownership of Humble, Holloway and Humble could have sought

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6 Even a failure to attempt to appeal does not waive the disqualification issue, for it "cannot be waived." *Ex Parte Miller*, 696 S.W.2d 908, 910 (Tex. Crim. App. 1985) (en banc). If Judge Walker was constitutionally disqualified, his judgment was "absolutely void" and subject to collateral attack. *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221 (1947); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) ("no capacity to act as a court"); see *Moore v. Dempsey*, 261 U.S. 86 (1933). Even if the Supreme Court of Texas had affirmed the Walker Judgment on its merits, it still would have been a "nullity" if Judge Walker was in fact constitutionally disqualified. *Chambers v. Hodges*, 23 Tex. 105 (1859).

reimbursement from Judge Walker and/or his personal attorneys and accountant for the moneys illegally paid to them by his orders which had been vacated by the appellate court three times.

The leading decision by this Court on disqualification of state judges for interest under the Due Process Clause of the 14th Amendment is *Tumey v. Ohio*, 273 U.S. 510, 533 (1923). There the Court decreed:

> "Every procedure which would offer a possible temptation to the average man as judge * * * not to hold the balance nice, clear and true * * * denies * * * due process of law."

In *Tumey* the Court held that the fact that the state judge received $12 in court costs if he ruled against the defendant disqualified the judge under the Due Process Clause. In the present case Judge Walker received a benefit of more than $100,000 by his judgment divesting the defendant Holloway of his ownership of Humble despite the jury's findings.

The financial benefit to Judge Walker was more immediate, obvious, direct and substantial than those which this Court ruled were sufficient to violate due process in *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986), *Gibson v. Berryhill*, 411 U.S. 564 (1972), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). The record in the present case presents far

more egregious due process violations than any this Court considered in *Tumey v. Ohio* or *any* of its progeny.

Judge Walker did not merely fail "to hold the balance nice, clear and true." He in fact dispensed with the scales of justice entirely by making his judgment before the trial began,[7] and by then assuming personal command of a private army of armed guards, lawyers, accountants and witnesses waging a possessory war of extortion against the defendants. But as to Flojo and its stockholders there was never even any formal declaration of war by Judge Walker; he wiped them all out completely by a sneak attack.

B. JUDGE WALKER WAS DISQUALIFIED UNDER THE DUE PROCESS CLAUSE BY HIS PATENT BIAS.

In *In Re Murchison*, 349 U.S. 133, 139 (1955), this Court ordained:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always

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7 Within a few hours after the Brownings entered their first formal appearance in his court, Judge Walker ordered Humble into a devastating receivership, at the very beginning of the receivership hearing, before Humble's attorney even had a chance to cross-examine the plaintiffs' first witness. See *Humble Exploration Company, Inc. v. Fairway Land Company, et al.*, 641 S.W.2d 934, 936 (Tex. App.--Dallas 1982, writ ref'd n.r.e.).

> endeavored to prevent even the probability of unfairness."

Quoting the "possible temptation" rule of *Tumey v. Ohio* set forth above, the Court then stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14...." *Id.*

There was no appearance of justice in the Browning Case. There was no absence of actual bias. The uncontroverted facts set forth above and in the separate petition of the Holloways establish actual bias and the certainty, not the probability, of unfairness. But they do more even than that. They show active, continuous collusion and conspiracy between Judge Walker and the Brownings' attorneys throughout the trial to deny the defendants any possibility of a real trial.

The egregious nature of the due process violations in the present, widely-publicized litigation justify this Court's summary reversal of the courts below to signal to all our citizens, as well as just all those in this small community and elsewhere throughout Texas who have been directly

affected, that judicial conduct such as former Judge Walker's in the Browning Case ultimately will not be tolerated anywhere in our system.

PRAYER

Flojo prays that the judgment of the Dallas Court of Appeals be reversed and rendered in favor of Flojo, thereby vacating, in its entirety, the judgment as to Flojo in Cause No. 82-5742-I and 79-9623-I, *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, in the 162nd Judicial District Court of Dallas County, Texas, as being void ab initio.

Respectfully submitted,

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